Supreme Court, U.S.
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No. 98-1665

In The

Supreme Court of the United States

GEORGE KILLINGER, Warden,

Petitioner,

v.

LARRY NEVERS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should deny review of the decision of the Sixth Circuit Court of Appeals affirming the district court's issuance of a writ of habeas corpus, where the asserted error raised by Petitioner consists of the alleged misapplication of a rule of law that Petitioner concedes is properly stated, where Respondent would prevail under any applicable standard, and where the court of appeals correctly applied the standard in this context.

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OPINIONS BELOW

Respondent notes that the opinion of the United States Court of Appeals for the Sixth Circuit has been published as follows: *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999).

In addition, Respondent adds the opinion and order of the United States District Court for the Eastern District of Michigan, which is published as follows: *Nevers v. Killinger*, 990 F.Supp. 844 (E.D. Mich. 1997).

STATEMENT OF JURISDICTION

Respondent does not quarrel with Petitioner's right to seek review under 28 U.S.C. § 1254(1), or with the timeliness of its Petition for a Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent does not quarrel with Petitioner's presentation of the constitutional provisions involved.

RESPONDENT'S STATEMENT OF THE CASE

Petitioner has accurately presented the procedural history and facts of the underlying case. The lone issue raised by Petitioner, however, revolves around the harmlessness of an error that Petitioner has consistently conceded constitutes federal constitutional error – i.e., a

series of extraneous influences upon the jury that convicted Respondent. Accordingly, Respondent sets forth herein additional facts regarding the nature of these extraneous influences.

In this case, Respondent's jury was exposed to numerous extrinsic influences throughout the trial. Respondent raised this issue under the Sixth and Fourteenth Amendments on direct appeal in the Michigan state courts. The Michigan Supreme Court held that three (3) extraneous influences in particular deprived Respondent of his constitutional rights: the jurors' viewing of the video *Malcolm X* during deliberations, the jurors' knowledge that the City of Detroit was bracing for a riot in the event of an acquittal, and the jurors' awareness that Respondent had been a member of the controversial STRESS (Stop The Robberies Enjoy Safe Streets) police unit. However, the Michigan Supreme Court reversed only the conviction of Walter Budzyn, Respondent's co-defendant and partner; it affirmed Respondent's conviction because the extraneous influences were allegedly harmless as to him. The court relied on its assessment that the evidence against Respondent was "overwhelming." *People v Budzyn*, 456 Mich. 77, 566 N.W.2d 229, 240-41 (1997).

In the habeas corpus proceedings, both in the district court and court of appeals, the only issue has been whether the admitted federal constitutional errors were harmless. Indeed, at the hearing on Respondent's petition, the district court and counsel for the state engaged in the following colloquy:

> THE COURT: Do you agree with the Michigan Supreme Court that constitutional errors were made in this case?
>
> MS. AGNELLO: Yes, constitutional trial error was made and those were the extrinsic influences.
>
> THE COURT: So you really have no argument with that?
>
> MS. AGNELLO: No. I'm accepting what the Michigan Supreme Court has in the analysis that they applied.

(12/19/97 Motion Hearing at Tr. 24). *See also Nevers, supra*, 990 F.Supp. at 867 ("[I]t is undisputed by either the Petitioner [Nevers] or Respondent [Killinger] that the Michigan Supreme Court was correct in its determination that the above cited influences constituted a constitutional error of Petitioner's Sixth Amendment and Due process rights.").

The opinion of the district court set forth the pertinent facts regarding the three (3) extraneous influences that were deemed to constitute federal constitutional error:

> On August 2, 1993, prior to the close of evidence, the trial court advised the jury that although no testimony would be heard on August 5th and 6th, they would be required to come to court on both days. *Id.* at 91, n. 13, 566 N.W.2d 229. Apparently, at the request of the jurors, the Court agreed to allow them to watch videotaped movies. The jurors were instructed by the Court that they would not be able to bring their own movies, rather, the movies would be supplied by the Court. Juror affidavits

C, D. The Petitioner's jury was given the film *Malcolm X*, among others. The jury watched approximately half of the film. Juror affidavit C.

The opening sequence of the film – based on Malcolm X's autobiography – begins with the voice of Malcolm X's character giving a speech charging the white man with being the greatest murderer on earth. *People v. Budzyn*, 456 Mich. 77, 93-96, 566 N.W.2d 229, 236-38 (1997). The voice over also specifically mentions the City of Detroit. According to the Michigan Supreme Court the narrative is as follows:

> Brothers and sisters, I am here to tell you that I charge the white man, I charge the white man with being the greatest murderer on earth. I charge the white man with being the greatest kidnapper on earth. There is no place in this world that man can go and say he created peace and harmony. Everywhere he's gone he's created havoc. Everywhere he's gone he's created destruction. So I charge him, I charge him with being the greatest kidnapper on this earth. I charge him with being the greatest murderer on this earth. I charge him with being the greatest robber and enslaver on this earth. I charge the white man with being the greatest swine eater on this earth, the greatest drunkard on this earth. He can't deny the charges. You can't deny the charges. We're the living proof of those charges. You and I are the proof. You're not an American. You are a victim of America. You didn't have a choice coming over here. He didn't say "black man, black woman, come on over

> and help me build America." He said "nigger get down in the bottom of that boat and I'm taking you over there to help me build America." Being born here does not make you an American. I'm not an American. You're not an American. You're one of the twenty-two million black people who are victims of America.

Id. at 94, n. 15, 566 N.W.2d 229.

Even more significant than the provocative language cited above is that during this voice over narration, footage of Rodney King being beaten by Los Angeles police officers is interspersed with a picture of an American flag. *Id.* at 93-94, 566 N.W.2d 229. The footage of Rodney King being beaten is shown in slow motion – and repeated eight times – as the American flag begins to burn. *Id.* In addition, the narration makes explicit reference to the City of Detroit:

> [W]e didn't see any democracy on the streets of Harlem, . . . on the streets of Detroit. . . . No, we've never seen democracy. All we've seen is hypocrisy. We don't see any American dream. We've experienced only the American nightmare.

Id. at 94, n. 15, 566 N.W.2d 229.

Later, in another scene in the film, the Malcolm X character makes obvious reference to white police officers when he states:

> No, I'm telling you that devil has made dead souls out of you and I. . . . Why, my brothers and sisters, he should get down on his knees. He should beg our mercy. Oh. My brothers and sisters, his kind has committed God's greatest crime against your and my

> kind every day of his life. He ought to get on his knees and say he's committed the crime. But does he do that? Does he do that? No. No, he scorns you. He splits your head with his night stick, he busts you upside the head with that billy club, he calls you a nigger. I'm telling you he calls you a coon. That's what he says to you – "Boy," "Nigger." Four hundred years is long enough. You're been sitting down, laying down, and bowing down for four hundred years. I think it's time to stand up.

Id. at 94-95, 566 N.W.2d 229 (emphasis added).

The Michigan Supreme Court found that viewing the movie with its forceful words and images could have triggered an inappropriate emotional response in the jury because the defendants' conduct, as alleged, matched that described by the Malcolm X character, as well as the images shown in the opening sequence of the film. *Id.* at 96, 566 N.W.2d 229. The court found that it may have been difficult for the jury to set aside those words and images and examine, bias fee [sic], the testimony of the defendants as well as that of other prosecution witnesses. *Id.* at 96-97, 566 N.W.2d 229. As the state court said:

> In focusing the jurors attention in a very emotional way on the racial element of the crime, the images from the film invited the juries to view the instant crime as part of a pattern of police brutality, effectively asking them to redress this injustice. The juries were, however, bound to decide the case on only the facts as presented at trial and to

> weigh defendants' credibility without consideration of these extraneous factors.

Id. at 97, 566 N.W.2d 229.

In addition to being shown the *Malcolm X* film, at least one member of the petitioner's jury learned during deliberations that the City of Detroit was bracing for a riot in the event of an acquittal. *Id.* at 98, 566 N.W.2d 229. According to the juror affidavits the juror was aware of the fact that "in the event of a riot, they were going to close the freeways. . . . [and] the National guard was being put on alert for our verdict." *Id.* at 98, n. 21, 566 N.W.2d 229. The Michigan Supreme Court thus held that although the jurors obviously should not have considered whether there would be a riot if they acquitted the defendants, "the reality is, however, that the jurors' knowledge that the city was preparing for a possible riot may have caused them to fear an acquittal." *Id.* at 98, 566 N.W.2d 229.

Furthermore, the jurors were exposed to, and considered, information that petitioner had previously been a member of the highly controversial police unit STRESS.[9] Although this information

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[9] The acronym STRESS stood for: Stop The Robberies Enjoy Safe Streets. The unit was a controversial decoy unit of the Detroit Police Department that gained a reputation for brutality after 20 people, most of them black, died at the hands of police officers over a three year period. *People v. Budzyn*, 456 Mich. 77, 90-91, 566 N.W.2d 229, 236 (1997); *See also* Petitioner's Appendix, V. II, pg. 394a. As a juror from Petitioner's jury stated "[i]t was explained during deliberations that STRESS was a police group that regularly abused young black males in the city."

Juror affidavit C. The group was disbanded by then Mayor Coleman Young in 1974. Petitioner's Appendix, V. II, pg. 394a.

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was not introduced at trial, the jurors considered it during their deliberations, and apparently considered it significant: "During deliberations, Mr. Nevers' participation in STRESS was discussed, and it kind of set the tone from the beginning of our deliberations. It was explained during deliberations that STRESS was a police group that regularly abused young black males in the city." Juror affidavit C.

The Michigan Supreme Court found the fact the jury considered such information highly prejudicial. The court correctly states that:

> This is the kind of concrete, factual evidence that could substantially compromise the ability of a jury to issue a fair verdict because the evidence relates directly to the past conduct of the police officers. This extraneous influence creates more than an emotional reason to convict. It suggests . . . that these officers may have been acting in accordance with their preexisting racist predisposition to target young black men for abuse when they encountered Malice Green. . . . It is the kind of evidence that has a direct and rational connection between it and an adverse verdict. . . . Similarly, in hearing that defendant [sic] were members of an allegedly violent and racist unit, the juries' ability to resolve factual questions

> before them may have been severely impaired.

Id. at 99-100, 566 N.W.2d 229.

Nevers, supra, 990 F.Supp. at 865-67.

RESPONDENT'S ARGUMENT

It is Respondent's position that this Court should deny review on certiorari for three distinct reasons. First, under Supreme Court Rule 10, the issue raised by Petitioner is inappropriate for review by this Court since it consists of the alleged misapplication of a rule of law that Petitioner concedes is properly stated. Second, the Court of Appeals's alleged failure to apply the correct legal standard makes no difference in this case since Respondent would prevail under any applicable standard. Third, the court of appeals, in its well-reasoned opinion, did apply the correct standard in this context.

Rule 10 of the Rules of the Supreme Court of the United States provides in pertinent part as follows:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Here, in its Petition for a Writ of Certiorari, Petitioner asserts error consisting of the misapplication of a rule of law that Petitioner concedes is properly stated by the Sixth Circuit. Under the "Reasons for Granting the Writ," after discussing the First Circuit's approach to habeas

cases under the Antiterrorism and Effective Death Penalty Act (AEDPA), Petitioner states as follows:

> In this case [*Nevers v. Killinger*], the [Sixth Circuit] Court of Appeals appropriated the language of [*O'Brien v. Dubois*, 145 F.3d 16 (1st Cir. 1998)] as a means of giving clarity to the "debatable among reasonable jurists" test which the Sixth Circuit had already adopted. Petitioner would accept that this case holding does not create a new hybrid test, but rather provides a clear and comprehensive manner of stating the "debatable among reasonable jurists" test. However, the Court of Appeals's *application* of the test in this case is so flawed as to reveal a strong reluctance to move from the de novo mode of review to a deferential review of State court decisions, which of course is what is mandated by the AEDPA[.]

Petition at 13 (emphasis in original).

Thus, by its own terms, the Petition in this case takes issue with the *application* of a test under the AEDPA that is not only "properly stated," but is in fact endorsed by Petitioner. It is precisely this type of claim, as reflected in Rule 10, that is inappropriate for review by this Court.

In addition, this Court should not grant review because Respondent would prevail under any applicable standard. The perceived errors in the Sixth Circuit's opinion, even if "corrected," would not lead to a different result. As this Court stated in *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945), "[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected

its views of federal laws, our review could amount to nothing more than an advisory opinion." *See also Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (citing above language from *Herb*).

Here, Petitioner is critical of the Sixth Circuit's statements regarding the relationship between, on the one hand, the new AEDPA and *Chapman v. California*, 386 U.S. 18 (1967), and, on the other hand, the established habeas standard under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and *O'Neal v. McAninch*, 513 U.S. 432 (1995), in the context of this case. It is Respondent's position, as the district court explicitly found and the court of appeals implicitly found, that under any applicable standard he would prevail. *Nevers, supra*, 990 F.Supp. at 874; *Nevers, supra*, 169 F.3d at 371-72.

Conspicuous by its absence in the Petition in this case is any allegation that a different view of the law would make any difference in the result. Indeed, this case has been accurately characterized as a credibility contest at every level – the state supreme court,[1] the federal district court,[2] and the federal court of appeals[3] – thus making it

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[1] *People v. Budzyn*, 456 Mich. 77, 100, 566 N.W.2d 229, 239 (1997) (extrinsic evidence regarding STRESS was damaging, "particularly in a case, like this one, that was a credibility contest.").

[2] *Nevers v. Killinger, supra*, 990 F.Supp. at 873 ("Thus, rather than physical evidence, it was clearly Petitioner's credibility, or lack thereof, which resulted in his conviction.").

[3] *Nevers v. Killinger*, 169 F.3d 352, 372 (6th Cir. 1999) ("It was the province of the jury alone to determine Nevers's credibility and the veracity of his testimony. The extraneous information that the jury was exposed to during the course of the trial, and

peculiarly inappropriate for a finding of harmlessness based on "overwhelming evidence" of guilt. Moreover, the fact that Respondent was convicted of the more serious offense of murder, as opposed to manslaughter, counsels strongly against a finding of harmlessness. As such, since Respondent would prevail under any formulation of the AEDPA standard, this Court should not grant certiorari only to render what would amount to an advisory opinion.

Finally, Respondent submits that the Sixth Circuit, in the context of assessing the state court's finding of harmless error, applied the correct AEDPA standard based on *Brecht* and *Chapman, supra. See Nevers, supra,* 169 F.3d at 371-72.

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particularly the information regarding STRESS, unquestionably had the potential for influencing how the jury viewed Nevers's testimony about his motivation for beating Green, and the Michigan Supreme Court acknowledged as much.").

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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